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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

ALUMINUM COMPANY OF AMERICA and CUPPLES PRODUCTS CORPORATION, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal From the United States District Court for the Eastern District of Missouri

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., 1a-24a), which contains the court's findings of fact and conclusions of law, is reported at 233 F. Supp. 718. The court's Final Judgment (App., 24a-26a) is unreported.

JURISDICTION

This is a civil action by the United States under Sections 7 and 15 of the Clayton Act (15 U.S.C. §§ 18, 25). The judgment of the district court was entered December 4, 1964, and notice of appeal was filed January 22, 1965. The jurisdiction of this Court is conferred by the Expediting Act of 1903, 32 Stat. 823, as amended, 15 U.S.C. § 29. *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962); *Maryland & Virginia Milk Producers Ass'n* v. *United States,* 362 U.S. 458 (1960). By orders entered March 12 and 25 and April 16, 1965, the district court extended the time for docketing this appeal to April 26, 1965.

QUESTIONS PRESENTED

This appeal is limited to the district court's order requiring Aluminum Company of America (Alcoa) to divest its aluminum fabricating facility at Corona, California, which, though leased to and operated by Cupples Products Corporation (Cupples), was built by Alcoa more than two years after it acquired Cupples. The court's decision on the merits and its order to divest Cupples are not challenged. The following questions are presented:

1. Whether the district court erred in ordering divestiture of an after-created plant which was not a replacement for or improvement to unlawfully acquired assets, was not financed by the sale of unlawfully acquired property or by profits of the acquired company, was not an integral part of the acquired company necessary in order to reconstitute it as a viable competitor, and which could be economically utilized by the acquiring company even if the public interest required

that its use be restricted to lines of commerce not involved in the case.

2. Whether the district court erred in ordering such divestiture without findings of fact, conclusions of law or opinion explaining why the public interest could not be adequately protected by means less drastic than divestiture of after-created property.

STATUTE AND RULE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Rule 52(a), Federal Rules of Civil Procedure, as amended January 21, 1963, provides:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due re-

gard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT

The Government filed its complaint on April 27, 1961, charging that Alcoa's acquisition of all the outstanding stock of Cupples violated Section 7 of the Clayton Act (15 U.S.C. § 18). The district court, after trial, concluded that the acquisition violated the statute (App., 22a-23a), and has ordered Alcoa to divest itself of (1) all ownership of Cupples, and (2) all right, title and interest in manufacturing facilities at Corona, California (App., 24a-25a), which were built and paid for by Alcoa two years after it had acquired Cupples (App., 3a). As stated in the Questions Presented, this appeal is limited to the order requiring Alcoa to divest the after-created Corona plant.

1. Description of Appellants

Cupples was, and is, a corporation organized under the laws of the State of Missouri, with its principal offices in St. Louis, Missouri (App., 2a). It commenced operation in 1946 as a fabricator of double hung windows made partly of wood and partly of aluminum, and gradually expanded into other aluminum products (App., 5a-6a). In the years immediately preceding the acquisition, aluminum nonresidential windows and

curtain wall were by far the most significant of Cupples' products, accounting for approximately 70 percent of its total sales (App., 6a).[1] At the time of acquisition, Cupples operated plants at St. Louis, Missouri, and Dowagiac, Michigan, and a warehouse at Dallas, Texas; in addition, since August 1962, approximately two and one-half years after the acquisition, it has operated a facility at Corona, California, under lease from Alcoa (App., 5a-6a; DXR 1; R. XIV. 2922).[2]

In 1959, the year preceding the acquisition, Cupples had assets valued at $5,313,072, and total sales of $13,575,481 (App. 6a-7a). On the basis of an Alcoa survey the court found that in 1957 Cupples was the largest fabricator of aluminum curtain wall, Cupples' principal product and one of the two lines of commerce established by plaintiff (App., 15a-16a).[3] The court made no findings as to Cupples' market position in the field of metal curtain wall, the second line of commerce

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[1] The balance of Cupples' sales was divided among aluminum extrusions, suspended ceiling systems, highway railings, non-residential doors, door frames, store fronts and entrances (App., 6a).

[2] All citations are to the original record on appeal. "DXR" refers to defendants' exhibits admitted at the hearing on relief held November 24, 1964; "GX" and "DX" refer to Government exhibits and defendants' exhibits admitted at the trial. The transcript of the trial appears in Volumes XVI through XXXVI, which are paginated consecutively. The balance of the record, except for exhibits which have not been placed in volumes, is contained in Volumes I-XV. The hearings on relief held October 23 and November 24, 1964 appear in Volumes XIII and XIV.

[3] Curtain wall is an exterior nonload-bearing wall which keeps out the elements and lets in light, and is attached to the structural framework of a building. Curtain wall may be made of a great variety of materials, both metallic and nonmetallic, and may be designed in a wide variety of different styles and forms (App., 10a, 13a-14a).

established by the Government, or as to Cupples' standing with respect to any of its other products.

Alcoa is an integrated producer of aluminum and aluminum products, with total assets in 1960 in excess of $1 billion and 1960 sales in excess of $800 million (App., 5a). Although it is still the largest domestic producer of primary aluminum, with a 32 per cent market share in 1959, Alcoa's market position has dropped sharply owing to the entry of substantial domestic and foreign competition since World War II (App., 4a-5a). Alcoa was not, and was not claimed to be, substantially competitive with Cupples. Similarly, while Alcoa is an important supplier of aluminum to the building industry, the acquisition of Cupples, which consumed less than ¼ of 1 per cent of primary aluminum available for domestic use (DX 198, 201; R. XXXIV 2278, 2281-2282), did not result in substantial foreclosure of Alcoa's aluminum-producer competitors, and the Government so conceded prior to trial (App., 7a).

On November 20, 1959, Alcoa and Cupples entered into a plan and agreement of reorganization under which Alcoa agreed to acquire all of the authorized and outstanding stock of Cupples in return for Alcoa stock having a market value of $6,750,000 (GX 16; R. XVI 116). The transaction was consummated on January 22, 1960, and Cupples has since been operated as a wholly-owned subsidiary of Alcoa.

2. The Corona, California, Facility

The Corona facility is a light aluminum fabricating plant located at Corona, California, near Los Angeles. The site was selected and purchased by Alcoa in 1961 (R. XIV 2920-2925, 3017-3018), and the plant was

constructed and equipped in 1962, more than two years after the Cupples acquisition (R. XIV 2980). Though leased to and operated by Cupples, the Corona facility is owned by Delcalo, Inc. (formerly Gateway Properties, Inc.), an Alcoa subsidiary, and was financed entirely by Alcoa (App., 3a; R. XIV 3022). The total cost of the land, plant and equipment at Corona was $2.8 million (DXR 3; R. XIV 2937), none of which represented proceeds from the sale of Cupples' assets or profits earned by Cupples (R. XIV 3022). The Corona plant did not replace Cupples' existing facilities which were expanded and improved by Alcoa at a cost of $1,575,000 (App., 18a; GX 53, 54; R. XVIII 423, 425).

Though financed and owned entirely by Alcoa the Corona plant is not claimed to be wholly independent of Cupples. It was built to enable Cupples to serve the West Coast market,[4] and, since Cupples was to operate it, Cupples' personnel laid out the plant and supervised its construction (R. XIV 2980-2982, 3019-3022). This, however, could have been done by Alcoa which had previously built similar plants in other parts of the country (R. XIV 2929-2967; DXR 2-47). In addition, Cupples transferred 29 employees from its St. Louis plant to provide a nucleus for the Corona operating staff (R. XIV 2982-2987).

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[4] Prior to the acquisition, Cupples had considered building a West Coast plant. The record shows, however, that if Cupples had gone forward, its plant would have been on a substantially smaller scale than the one built by Alcoa at Corona (R. XIV 3015-3017). The district court, by providing that Corona may be divested separately from Cupples (App., 24a-25a), has implicitly rejected the Government contention that Corona should be divested because Cupples would have expanded to the West Coast on its own (Government Memorandum in Support of Divestiture of the Corona Plant, hereafter cited as Gov't. Mem., R. 4; R. XIII 2795, 2800).

Since its completion in August 1962, the plant has functioned strictly as a Cupples' operation, making aluminum curtain wall, store fronts, windows and doors (DXR 49; R. XIV 2988-2989). The anticipated West Coast market for these products has not materialized, and the Corona operation lost more than $2 million in its first two years (DXR 52; R. XIV 2995, 3027-3032).

3. The Proceedings Below

(a) *The Complaint.* The complaint charges that Alcoa's acquisition of Cupples may substantially lessen competition or tend to create a monopoly in the production and sale of primary aluminum and aluminum extrusions, residential and nonresidential windows, doors, door frames, entrances and curtain wall (R. I 6-7). The prayer seeks divestiture of Cupples and an injunction prohibiting Alcoa from acquiring the stock or assets of any other corporation engaged in the manufacture and sale of any of the above-listed products (R. I 7-8). At no time was the complaint amended to include an allegation that Alcoa's ownership of the Corona plant was in violation of law or to seek an order for the divestiture of that plant.

(b) *Preliminary Injunction.* On May 22, 1962, two years after the Government learned of Alcoa's plan to build a West Coast plant (GX 16, pp. 14-15; R. XVI 116; Pl. Ans. to Int. 1; R. II 312), and at least two months after construction of the plant had commenced (R. XIV 2980), the Government filed a Motion for Preliminary Injunction asking the court to restrain "defendants from taking any further action to build an Alcoa plant at Corona, California," and from further commingling of Alcoa's and Cupples' assets and personnel (R. I 214). In an Order and Memorandum

Opinion filed July 30, 1962, the court granted the requested relief against commingling (R. V 685-686), but refused to enjoin Alcoa from completing the Corona plant and rejected a Government request that the plant be deeded forthwith to Cupples (R. V 683). The court permitted Alcoa to carry out its expressed intention to lease the Corona plant to Cupples (*ibid.*), subject to the requirement that "the products made at that plant be sold and advertised as Cupples products" (R. V 686).

(c) *Trial and Decision on the Merits.* By the time of trial, the Government had abandoned its claim of anticompetitive effect with respect to primary aluminum and aluminum extrusions, residential windows, doors, door frames, and entrances. In addition, the parties had agreed that the United States as a whole was the relevant geographic market. Accordingly the contested issues were: (1) whether (a) metal curtain wall, (b) aluminum curtain wall, a submarket of (a), (c) metal nonresidential primary windows, and (d) aluminum nonresidential primary windows, a submarket of (c), were proper lines of commerce; and (2) whether Alcoa's acquisition of Cupples had the prohibited effect in any of such alleged lines of commerce (App., 7a-8a).

The court ruled as follows: It held that both metal and aluminum curtain wall were proper lines of commerce (App., 12a-13a), but that the Government had not sustained its burden of proof on the two alleged window lines (App., 24a). With regard to competitive effect, the court acknowledged that the Government did not claim elimination of actual or potential competition between Alcoa and Cupples or that the acquisition would effect a substantial foreclosure of Alcoa's pri-

mary aluminum-producer competitors (App., 7a). Thus, in the absence of traditional horizontal or vertical effects, the sole issue was whether Alcoa's ownership of Cupples was likely to impair competition in either of the two curtain wall lines of commerce. Finding that Alcoa's purpose in acquiring Cupples had been to get 40 per cent of the aluminum curtain wall business, that Alcoa had the power to achieve this objective, and that Alcoa's financial and technical resources conferred certain advantages upon Cupples (App., 17a-18a), the court held that the acquisition violated the statute and that, accordingly, Alcoa would "be ordered to divest itself of the stock of Cupples" (App., 24a).

Apart from describing briefly the preliminary injunction and noting its applicability to the Corona plant (App., 3a), the court's opinion on the merits made only passing reference to the Corona situation (App., 6a, 18a). It clearly did not purport to decide what disposition, if any, should be made of Corona, for its concluding sentence states that because of Alcoa's ownership of Corona, "a further hearing will be held to determine the proper method and the scope of the divestiture" (App., 24a).

(d) *The Hearings on Relief and Final Judgment.* The court held two hearings on the Corona question. At the first of these, held October 23, 1964, arguments were presented by counsel but no additional evidence was taken. At the close of this hearing, the court stated that it was not "well enough advised about [the Corona problem] at this point to enter a decree" (R. XIII 2881). Accordingly, a further hearing was held on November 24 and 25, 1964. Defendant's evidence showed that Corona had been extremely unprofitable and would be a liability rather than an asset to Cupples

(DXR 52; R. XIV 2995, 3027-3032); that the plant is a typical aluminum fabricating plant similar to others Alcoa had built and, therefore, was not the product of Cupples' "know-how" (R. XIV 2929-2967, 3019-3024; DXR 2-47); and that, if permitted to retain the plant, Alcoa could use it to fabricate a number of products not made by Cupples, such as aluminum anodized extrusions, coil sheet, roofing, siding, telephone booths, and beer barrels (R. XIV 2960-2975; DXR 43-47). The Government's evidence did not controvert the above but sought only to show that certain competitors of Cupples might be prejudiced if Alcoa retained the plant and continued to use it to make aluminum curtain wall, windows, and doors (R. XIV 3058-3119). At both hearings, counsel for appellants, though urging that Alcoa should be permitted to keep the plant without restriction, made clear that Alcoa would accept, as an alternative to divestiture, an injunction limiting its use of the plant (R. XIII 2871, 2883; R. XIV 3124-3126). Government counsel, though advocating divestiture, conceded that the Government's principal objective was to prevent Alcoa from using the Corona plant and Cupples' personnel and know-how as a means of entering into the manufacture of aluminum curtain wall and certain related products (R. XIII 2881-2882).

On December 4, 1964, the court entered its Final Judgment. Alcoa was ordered to divest itself of (1) all ownership of Cupples, which includes improvements to Cupples' original plants in excess of $1.5 million; and (2) all ownership in the assets located at Corona, California, which have been operated by Cupples (App., 24a-25a). Since the Judgment contemplates that Corona may be divested separately from Cupples, the court evidently rejected the Government claim that Corona

must be divested in order to reconstitute Cupples as a viable competitor. Beyond that, however, since no findings of fact, conclusions of law or opinion were filed relating to Corona, it is impossible to tell how the court resolved the factual issues presented in the relief proceedings or what standards, if any, it applied in requiring divestiture of Corona.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents substantial questions concerning the formulation of equitable relief in Section 7 cases. It is appellants' position that the trial court's order requiring Alcoa to divest its after-created Corona plant must be set aside for two reasons: *First,* an important threshold error is the district court's failure to make findings of fact and conclusions of law as required by Rule 52(a), Federal Rules of Civil Procedure. This omission not only impedes review of the court's decision on relief but, in itself, constitutes reversible error. *Second,* as an examination of the record will show, the court erred in ordering divestiture of Corona since the public interest can be fully protected by less harsh measures.

I. THE DISTRICT COURT'S FAILURE TO MAKE FINDINGS REQUIRES REVERSAL AND A REMAND FOR FURTHER PROCEEDINGS.

Rule 52(a) requires that "the court shall find the facts specially and state separately its conclusions of law thereon." There are two reasons for this important requirement. First, findings of fact facilitate judicial review, for "prerequisite to such review is evidence that a judgment was in fact made, that the parties were heard on the issue, that the proper standards

were applied." *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130 (1962).[5] In addition, as stated by Judge Frank in *United States* v. *Forness*, 125 F. 2d 928, 942 (2d Cir. 1942), the trial court's findings of fact have

> a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty. Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.

Here, we submit, it would have been difficult—indeed, impossible—for the trial court to articulate valid grounds for divesting Corona (*infra*, pp. 16-21).

This Court's decisions leave no doubt that Rule 52(a) applies to the decision on relief, for "the choice of remedy is as important a decision as the initial construction of the statute and finding of a violation" *Gilbertville Trucking, supra*, 371 U.S. at 130. Indeed, this Court has repeatedly set aside remedial judgments where there were adequate findings on the merits but, as here, the court or agency had failed to explain its reasons for selecting a harsh remedy when some less severe alternative might have sufficied.[6] These deci-

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[5] See also *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964).

[6] *Gilbertville Trucking, supra*, 371 U.S. at 129-31; *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 126-29 (1948); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 165-70 (1962); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 (1946); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189-97 (1941).

sions require at least a reversal and remand for further proceedings in conformity with Rule 52(a). Such a remand is anything but "purely academic for the sake of procedural regularity," since, to say the least, "a doubt can be raised" as to the propriety of divestiture. *Gilbertville Trucking, supra,* 371 U.S. at 131.

(a) The Court Did Not Find That Other Remedies Would Be Ineffective

A "doubt" arises, first of all, because the district court ordered divestiture of Corona without first concluding that less drastic measures would not be "effective to restore competition." *United States* v. *E. I. duPont de Nemours & Co.,* 366 U.S. 316, 326 (1961). As this Court has held, it is the duty of the courts "to give 'complete and efficacious effect to the prohibitions of the statute' *with as little injury as possible to the interests of private parties or the general public,*" *Gilbertville Trucking,* 371 U.S. at 130 (emphasis added). Accordingly, divestiture, the "most drastic" of antitrust remedies, should be ordered only "[i]f the Court *concludes that other measures will not be effective to redress a violation . . .*" *duPont, supra,* 366 U.S. at 326-27, quoted in *Gilbertville Trucking, supra,* 371 U.S. at 130 (emphasis added). Here, the court has ordered Alcoa to divest its $2.8 million Corona plant without the necessary predicate, that is, without a prior conclusion that less drastic measures would not be effective to redress the violation. In fact, as is shown in Part II, the record would not support any such conclusion.

(b) The Corona Plant Is After-Created Property

Alcoa built and paid for the Corona plant long after the Cupples acquisition, and its ownership of Corona was not claimed or found to violate the Act. These facts cast further doubt on the validity of the court's decision on relief.

Section 7 does not prohibit internal growth, and neither its language nor the history of its enforcement suggests that divestiture is to be invoked against post-acquisition transactions that do not, themselves, violate the statute.[7] Indeed, heretofore the Federal Trade Commission and the courts have consistently refused to order diverstiture of after-acquired property except where it was a replacement for, or closely integrated with, unlawfully acquired assets.[8] Since the Corona plant does not meet these conditions, the court's order represents a new departure in Section 7 enforcement. For this reason, it was especially important that the legal and factual bases of the order be set forth in findings of fact and conclusions of law as required by Rule 52(a).

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[7] Cf. Section 11 of the Clayton Act which authorizes administrative agencies having Section 7 jurisdiction to issue an order requiring the offender "to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, *held . . . contrary to the provisions of Section 7 . . .*" 15 U.S.C. § 21 (Emphasis added).

[8] *United States* v. *Maryland & Virginia Milk Producers Ass'n*, 167 F. Supp. 799, 808-9 (D.D.C. 1958), *aff'd in pertinent part*, 362 U.S. 458, 472-73 (1960); *Crown Zellerbach Corp.*, 54 FTC 769, 806-8 (1957) *affirmed* 296 F. 2d 800 (9th Cir. 1961), *cert. denied* 370 U.S. 937 (1962); *Reynolds Metals Co.* v. *FTC*, 309 F. 2d 223, 230-31 (D.C. Cir. 1962); *Pillsbury Mills, Inc.*, 57 FTC 1274, 1412-15 (1960); *Union Carbide Corp.*, 59 FTC 615, 657 (1961).

Significantly, the district court recognized that Corona presented a special situation (App., 24a), and held two hearings for the express purpose of dealing with this novel problem of relief. In the absence of findings or conclusions, however, it is impossible to tell what weight was given to the evidence or what standards, if any, were applied.

Finally, there is sufficient doubt to require reversal and a remand for further proceedings because, as will next be shown, it is not only "conceivabl[e]," but virtually certain, that the effect of the Cupples acquisition "could . . . be discontinued without divestiture" of Corona *Gilbertville Trucking, supra*, 371 U.S. at 131.

II. THE RECORD DOES NOT ESTABLISH THE NEED FOR DIVESTITURE OF CORONA.

Normally, "it is not the function of this Court to search the record and analyze the evidence in order to supply findings which the trial court failed to make." *Kelley* v. *Everglades Drainage District,* 319 U.S. 415, 421 (1943). In this case, however, the district court's error can be so easily ascertained from the record, that this Court should interdict divestiture of Corona and remand the case with instructions to determine what other and different relief may be required in order to redress the violation. In any event, it is important to consider what the record shows, not only to demonstrate further that a "doubt" exists but to indicate questions to which the district court's particular attention should be directed upon a remand for further proceedings.

(a) Cupples Can Be Divested as a Viable Competitor Without Corona

The Government argued that retention of Corona by Alcoa would substantially diminish "the chances of Cupples developing into a viable independent fabricator . . ." (Gov't. Mem., p. 4; R. XIII 2800). It was shown, however, that the West Coast curtain wall market has not materialized, and that, as a result, the Corona plant has lost a substantial amount of money and would be a liability rather than an asset to the divested Cupples (DXR 52; R. XIV 2995, 3027-3032). The court evidently agreed that Cupples does not need Corona, for the Final Judgment contemplates that it may be divested separately from Cupples (App., 24a-25a). This conclusion is eminently correct, since before the acquisition Cupples, without Corona, was not only a viable competitor but was the leading producer of aluminum curtain wall (App., 22a-23a). If anything, its position will be even stronger after divestiture by virtue of Alcoa-financed improvements to its original plants in an amount in excess of $1.5 million (App., 18a; GX 53, 54; R. XVIII 423, 425).

(b) Divestiture of Corona Is Not Required in Order to Eliminate Competitive Benefits to Alcoa from the Cupples Acquisition

The second theme pursued by the Government was that Alcoa, if permitted to keep Corona, "would retain substantial, tangible gain as a direct consequence of the illegal acquisition." (Gov't. Mem., p. 2; R. XIII 2798). In meeting this contention, it is important to differentiate between (1) Aloca's mere ownership of Corona as an aluminum fabricating plant, and (2) Alcoa's possible use of the plant to compete in the

aluminum curtain wall business after divesting Cupples.

(1) *Corona, as an Aluminum Fabricating Plant, Is Not the "Fruit" of the Acquisition.* Evidence adduced at the second hearing on relief established that Alcoa's ownership of Corona was not in any meaningful sense the "fruit" of the acquisition. It is true that Cupples, which was to operate Corona, laid out the plant and supervised its construction. Beyond that, however, Alcoa selected the site, purchased the land, and paid for the plant and all machinery and equipment housed therein (R. XIV 2920-2925, 3017-3018, 3022). Furthermore, any implication that Cupples' "know-how" was essential, or even significant, in the creation of Corona, is emphatically refuted by the record.

Corona is not a unique, specialized facility but a typical light aluminum fabricating plant similar to others Alcoa has built in the past (R. XIV 2929-2967; DXR 2-47). Indeed, the incontrovertible evidence established that Cupples' expertise lay in the design of curtain wall installations; that it had no special capability in designing aluminum fabricating plants; that Alcoa could readily have designed and supervised the construction of Corona; that nearly all the equipment at Corona is standard aluminum fabricating machinery; and that Corona, with no significant modification, could make a wide variety of aluminum products. (R. XIV 2929-2975, 3019-3024; DXR 2-47). In sum, though built for Cupples to operate as a curtain wall facility, Corona is merely a standard aluminum fabricating plant and, as such, is essentially the "fruit" of Alcoa's own substantial post-acquisition investment. The court, of course, has not found to the

contrary. *Schine Chain Theatres, Inc.* v. *United States, supra,* 334 U.S. at 129.

(2) *Divestiture Is Not Required to Prevent Alcoa's Use of Corona in the Curtain Wall Field.* We respectfully submit that the Government's real concern is not with Alcoa's ownership of Corona *per se* but with its potential use of this facility, together with "Cupples' personnel and technology," as a means of entering into the manufacture of curtain wall and certain related products (Gov't. Mem., pp. 4, 10; R. XIII 2800-2806). Indeed, this was conceded by Government counsel in the following colloquy (R. XIII 2881-2882):

> THE COURT: Isn't your problem really as far as the Corona plant is concerned, that you don't want Alcoa to use that plant as a means of getting into the business? Isn't that what your problem is?
>
> MISS LINGREEN: *That is right.* But curtain wall is entirely too limited . . . . [I]t is a matter of not being able to use it with respect to any of the products made by Cupples— . . . windows and so forth. (Emphasis added.)

Obviously, divestiture, which forecloses Alcoa from using the Corona plant for *any* product, goes far beyond even the Government's stated objective.

In view of the above, it is not surprising that the court, itself, suggested the availability of injunctive relief. "I can envision a number of ways," it said

> where this problem can be taken care of without disposing of the Corona plant. This can be by enjoining Alcoa from employing any of the employees who are presently working out there. That is one way. Another is to prohibit them from

using it for curtain wall. (R. XIII 2865; see also 2854).

Appellants' counsel, though advocating retention of Corona without restriction,[9] repeatedly emphasized appellants' willingness to accept injunctive provisions that would deprive Alcoa of Cupples' know-how (R. XIII 2871) and effectively prohibit it from using the Corona plant in the aluminum curtain wall line of commerce (R. XIII 2883; R. XIV 3124-3126). Indeed, as noted, much of appellants' argumentation and proof in the relief proceedings was directed at showing that Corona is a typical fabricating plant that could be economically utilized to make a broad range of aluminum products not made by Cupples (R. XIII 2847, 2854, 2861-2862, 2878, 2896).[10]

Significantly, Government counsel did not advance a single reason why a proper injunction would not be sufficient. Rather, her objections went to the scope of the injunction, it being the Government's position that the prohibition should extend beyond aluminum curtain wall, the only line of commerce in which a violation was proved, to certain related Cupples' products, such as aluminum windows and doors (R. XIII 2854, 2866, 2882, 2884-2885; R. XIV 3135-3136). In support of this position, it was urged that to allow Alcoa to make windows and doors at Corona might adversely affect Cupples' competitors in those product lines, and

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[9] In previous cases, Section 7 violators had consistently been permitted to retain after-acquired assets without restriction. See note 8, *supra*.

[10] Among the products for which the Corona plant can be used are aluminum anodized extrusions, coil sheet, roofing, siding, telephone booths and beer barrels (R. XIV 2960-2975; DXR 43-47).

would create problems of enforcement since Alcoa, in violation of the proposed injunction, might "creep" from the aluminum window business into the forbidden curtain wall field. In response, appellants' counsel stated that "if there is an injunctive provision, it could be written . . . to see to it that" the danger foreseen by the Government "just does not occur" (R. XIV 3125).

Thus, though broader contentions were advanced by both sides, the real issue became one of the scope of an injunction limiting Alcoa's use of the plant. The court, without finding that injunctive relief was inherently inadequate and without attempting to formulate a workable injunction, avoided this issue by ordering divestiture.

(c) Divestiture of Corona Is Punitive, Not Remedial

"The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive." *duPont, supra,* 366 U.S. at 326. Accordingly, in the absence of proof that depriving Alcoa of its $2.8 million post-acquisition investment in Corona serves a necessary remedial purpose, such deprivation must be deemed punitive and, therefore, beyond the court's authority. Since no such finding has been or could be made on this record, the district court has not only failed to comply with Rule 52(a) but has disregarded established standards governing equitable relief in Section 7 cases.

CONCLUSION

For the foregoing reasons, we respectfully submit that substantial questions are raised by this appeal and that probable jurisdiction should be noted.

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